

V. O. v. Windsor Hospital

(September 9, 2009)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

V. O.

Opinion No. 12A-08WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Windsor Hospital

For: Patricia Moulton Powden
Commissioner

State File No. T-00023

**RULING ON CLAIMANT'S MOTION FOR AWARD OF ATTORNEY FEES AND
COSTS AND ON DEFENDANT'S MOTION TO DISMISS OR STAY**

The Commissioner previously decided this claim on March 27, 2008. Three issues had been presented: first, whether Claimant had reached an end medical result; second, whether her low back condition was causally related to her 2002 work injury; and third, whether massage therapy was a reasonable treatment for the 2002 injury.

The Commissioner ruled in Claimant's favor on the first issue, but denied her claim for benefits related to the second and third issues. Claimant having only partially prevailed, therefore, the Commissioner exercised the discretion granted by 21 V.S.A. §678(a) to award her only one-half of the attorney fees she had sought. In awarding fees in that amount, the Commissioner noted that Claimant had presented essentially the same body of evidence as to all three of the issues she had pursued. Therefore, the Commissioner reasoned, it was appropriate to award fees "based upon the efforts of counsel to the extent that those efforts may be allocated among the issues."

Claimant appealed the Commissioner's decision to the Windsor Superior Court for jury trial. Once again, she was able to garner only a partial victory. As the Commissioner had concluded, the jury found that Claimant's low back condition was not causally related to her 2002 work injury. Contrary to the Commissioner's decision, however, the jury concluded that massage therapy was a reasonable treatment.

In all, therefore, between the formal hearing before the Commissioner and the Windsor Superior Court jury trial, Claimant prevailed on only two of the three issues she had pursued. Nevertheless, she now seeks an award of the remaining one-half of the attorney fees she originally sought.

Claimant cites to *Electric Man v. Charos*, 179 Vt. 351 (2006), for the proposition that an award of attorney fees should not be apportioned when all of the issues litigated involve the same core of primary facts. Claimant also cites to *Sargent v. Town of Randolph*, 2007 VT 56, for the proposition that when a workers' compensation claimant does not prevail in proceedings before the Commissioner (and therefore does not merit an award of attorney fees), but later is victorious on appeal, he or she ought to be awarded all of the fees that previously were denied.

I do not read the cases Claimant cites so expansively. In *Electric Man* the Supreme Court admonished the trial court against viewing a lawsuit between a contractor and a homeowner as “a series of discrete claims,” but most workers’ compensation actions involve exactly that – a series of separate and distinct claims for separate and distinct statutory benefits. When the same core facts give rise to clearly distinguishable benefit entitlements, as happened here, it is within the discretion granted by §678(a) to fashion an attorney fee award with those results in mind.

Nor does the Supreme Court’s holding in *Sargent* preclude such a result. *Sargent* stands only for the proposition that the Commissioner is obligated to exercise the discretion granted by §678(a) in ruling on a request for attorney fees following a successful trial or appeal of a claim that initially had been denied at the formal hearing level. *Sargent*, 2007 VT 56 at ¶15. By no means does it mandate that that discretion no longer exists.

In exercising that discretion, I cannot ignore the fact that even after her appeal, Claimant still was not successful on all of her claims. I conclude that the fees already awarded remain appropriate.

Having determined that Claimant is not entitled to an additional award of attorney fees, there is no need to reach the issues raised by Defendant’s Motion to Dismiss or Stay.

Claimant’s Motion for Award of Attorney Fees is **DENIED**.

DATED at Montpelier, Vermont this 9th day of September 2009.

Patricia Moulton Powden
Commissioner